United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,959

BERNARD SMITH,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

130

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INDEX

JOINT APPENDIX

[Filed June 12, 1961]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Impanelled on April 27, 1961, Sworn in on May 2, 1961

THE UNITED STATES OF AMERICA	:	Criminal No. 455-61
v.	:	Grand Jury No. 579-61
BERNARD SMITH	:	Violation: 22 D.C.C. 1801 (Housebreaking) 22 D.C.C. 2801 (Rape)

The Grand Jury Charges:

On or about May 17, 1961, within the District of Columbia, Bernard Smith entered the dwelling of Beulah Mae Taylor with intent to commit an assault.

SECOND COUNT:

On or about May 17, 1961, within the District of Columbia, Bernard Smith had carnal knowledge of a female named Beulah Mae Taylor, forcibly and against her will.

/s/ David C. Acheson
Attorney of the United States in
and for the District of Columbia

A TRUE BILL:

/s/

Foreman.

[Filed June 16, 1961]

PLEA OF DEFENDANT

On this 16th day of June, 1961, the defendant Bernard Smith, appearing in proper person and by his attorneys Gilbert Hahn, Jr., and Jo V. Morgan, Jr., being arraigned in open Court upon the indictment, the same being read to him, pleads not guilty thereto.

The defendant is granted 10 days to file motions.

The defendant is remanded to the District Jail.

By direction of

George L. Hart, Jr.
Presiding Judge
Criminal Court # 3

HARRY M. HULL, Clerk

By/s/
Deputy Clerk

Present:

United States Attorney

By /s/ Harold Titus
Assistant United States Attorney

/s/ George Davis
Official Reporter

[Filed June 6, 1963]

INSTRUCTIONS REQUESTED BY DEFENDANT

1. Resistance

Force and resistance are essential elements in the crime of rape. Resistance must be shown by the female prosecutrix to her story and establish the absence of consent. The amount of resistance depends on the circumstances surrounding the female at the time. It is not necessary that the victim resist to the ultimate of her physical powers to sustain a conviction for this crime. Consent by the female to the act is not shown when the evidence discloses that her resistance has been overcome by threats which put her in fear of death or grave bodily harm or by these combined with some degree of physical force.

Points and Authorities in Support Thereof

Ewing v. U. S., 77 App. D.C. 14, 135 F. (2d) 633 (1942) removes, in the District of Columbia, the requirement that the female prosecutrix must resist to the utmost in order to disprove consent by the prosecutrix. However, Ewing (supra) does not remove from the law the requirement of resistance, depending upon the surrounding circumstances. The non-underlined charge was given in the first trial. Defendant requests the underlined language be added before the 'Ewing charge" language, on the ground that, without the underlined language, the jury is not made clearly aware that some resistance is required.

The language "absence of consent" does not clearly convey the idea of the requirement for the existence of "resistance".

The above underlined language is quoted from Wharton's Criminal Law (Vol. 1, 1932) Chapter XV - Rape, Section 734 "Resistance and Outcry", pages 994-5.

See also: Mills v. U. S., 164 U.S. 648 (1896) at page 648

> ". . .and though she (the prosecutrix) objects verbally, if she makes no outcry and no resistance, she by her conduct consents, and the act is not rape in the man." (Emphasis supplied.)

and Perkins, Criminal Law (1957 Ed) page 21; 62 Yale Law Journal pages 52-82.

2. Consent

There can be no rape of a female where there is consent, no matter how reluctantly it be given.

Points and Aughorities in support thereof.

The same as is profferred instruction No. 1.

Respectfully submitted,

[Granted in Substance]

/s/ Gilbert Hahn, Jr.

* * * * *

/s/ Jo V. Morgan, Jr.

* * * * *

Attorneys for Defendant

[Filed June 11, 1963]

MOTION FOR A NEW TRIAL

The defendant moves this Honorable Court for a new trial pursuant to Federal Rule of Criminal Procedure 33. For cause of this motion, defendant says:

1. The verdicts are against the weight of the evidence. The only definite documentary evidence by an impartial witness, the medical report, is completely inconsistent with the complaining witness' story. Defendant's story was fully corroborated with respect to his efforts to raise the additional $8.00. No witnesses were called to corroborate the complaining witness' claim that she had been out with friends earlier in the evening.

2. The Motion for Judgment of Acquittal should have been granted at the close of the entire case. There was not sufficient evidence to sustain a conviction on either count. Moreover, there was not sufficient corroboration under Count II. Under Count I, prosecutrix' own testimony as to the drunken state of defendant negates any specific intent.

3. That this Honorable Court erred in the following ways:

a. Permitting the Government to impeach the defendant with the use of his Rule (17(b) affidavit in violation of his right under the Fifth Amendment to the Constitution of the United States.

See: b. Concurring and dissenting opinion of Circuit Judge Wright on the appeal from the previous conviction.

c. Failure to grant the instructions to defendant.

d. Failing to give adequate instructions on "resistance".

e. Failing to give adequate instructions on "consent".

f. Failing to sufficiently inform counsel of its proposed action upon the requests prior to argument in violation of Federal Rule of Civil Procedure 30.

g. Failing to grant the several motions for mistrial.

h. Admitting in evidence over the objection of the defendant his admission of the involvement in writing of numbers.

i. Failing to give an instruction on absent witnesses.

j. Failing to give a sufficient instruction on the interest of witnesses.

k. Over emphasizing the interest of the defendant without pointing out in the charge the interest of other witnesses in the outcome of the case.

Respectfully submitted ,
/s/ Jo V. Morgan, Jr.
/s/ Gilbert Hahn, Jr.
Attorneys for Defendant

I certify that on this 11th day of June, 1963, I mailed, postage prepaid, copy of the foregoing to David C. Acheson, Esq., United States Attorney and Joel Blackwell, Esquire, Assistant United States Attorney, U.S. Courthouse, Washington 1, D. C.

/s/ Jo V. Morgan, Jr.

[Filed June 21, 1963]

[Clerk's Certificate - Denial of Deft's Motion for New Trial - Sentencing]

On this 21st day of June, 1963, came the attorney of the United States; the defendant in proper person and by his attorneys, Messrs. Jo V. Morgan, Jr., and Gilbert Hahn, Jr., whereupon the motion of the defendant for a new trial, coming on to be heard, after a hearing by the Court, is by the Court denied.

The defendant is sentenced to Imprisonment for a period of Ten (10) Months to Six (6) Years and Three (3) Months on each of Counts One and Two; said sentences by the Counts to run concurrently.

The defendant is remanded to the District of Columbia Jail.

By direction of
BURNITA SHELTON MATTHEWS
Presiding Judge
Criminal Court # 3

HARRY M. HULL, Clerk

By Deputy Clerk

Present:
United States Attorney
By Joel D. Blackwell (For Motion)
John N. Treaner, Jr. (For Sen.)
Assistant United States Attorney

[Filed June 21, 1963]

JUDGMENT AND COMMITMENT

On this 21st day of June, 1963 came the attorney for the government and the defendant appeared in person and by counsel, Messrs. Gilbert Hahn, Jr., and Jo V. Morgan, Jr.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of HOUSEBREAKING and RAPE as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

Ten (10) Months to Six (6) Years and Three (3) Months on Count One; Ten (10) Months to Six (6) Years and Three (3) Months on Count Two; said sentence on Count Two to run concurrently with the sentence imposed on Count One.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ BURNITA SHELTON MATTHEWS
United States District Judge.

Clerk.

A True Copy, Certified this 21st day of June, 1963

/s/ Harry M. Hull
Clerk

By /s/ Daniel J. Mencobom
Deputy Clerk.

[Filed June 21, 1963]

NOTICE OF APPEAL

Name and address of appellant

Bernard Smith, D. C. Jail, Washington, D. C.

Name and address of appellant's attorney

Jo V. Morgan, Jr., 815-15th St., N.W., Washington 5, D. C.

Gilbert Hahn, Jr., Washington Bldg., Washington 5, D. C.

Offense

Housebreaking and Rape

Concise statement of judgment or order, giving date, and any sentence

Conviction on both counts

Sentence on each count, 10 months to 6 years and 3 months, to run concurrently. Motion for new trial denied and sentence imposed June 21, 1963.

Name of institution where now confined, if not on bail

D. C. Jail

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

/s/ Bernard Smith
Appellant

/s/ Gilbert Hahn, Jr.

/s/ Jo V. Morgan, Jr.
Attorney for Appellant

June 21, 1963
Date

C7-Jad-Cmcy
12-5-63
(1)

BRIEF AND ADDITIONAL APPENDIX FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 17959 ~~16,913~~

BERNARD SMITH, Appellant

v.

UNITED STATES OF AMERICA, Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JO V. MORGAN, JR.
815 Fifteenth Street, N.W.
Washington 5, D.C.

GILBERT HAHN, JR.
944 Washington Building,
Washington 5, D.C.

OF COUNSEL

MARK B. SANDGROUND
944 Washington Building
Washington 5, D.C.

WHITEFORD, HART, CARMODY & WILSON
815 Fifteenth Street, N.W.
Washington, D.C.

STATEMENT OF QUESTIONS PRESENTED

1. Should the Trial Court have permitted the prosecutor to impeach the appellant's testimony with an affidavit the appellant had executed in order to have subpoenas issued without cost under the provisions of Federal Rules of Criminal Procedure 17(b), in violation of appellant's right under the Fifth Amendment to the Constitution of the United States, not to testify against himself?

2. Does Federal Rule of Criminal Procedure 17(b) itself violate appellant's right under the Fifth Amendment of the Constitution of the United States, not to testify against himself?

3. Did the Trial Court fail on several occasions to grant proper motions for a mistrial?

4. In view of the unimpeachable documentary evidence of motion for judgment of acquittal, was there sufficient evidence of corroboration to sustain denial at the close of all the evidence?

INDEX

TABLE OF CITATIONS
Cases

OTHER CITATIONS

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. ~~16,913~~ 17959

BERNARD SMITH,

Appellant

v.

UNITED STATES OF AMERICA

Appellee.

BRIEF AND ADDITIONAL APPENDIX FOR APPELLANT

JURISDICTIONAL STATEMENT

Judgment of conviction of Sections 1801 and 2801 of Title 22 of the D.C. Code (1963 Ed.) was entered on June 21, 1963 (JA 6). The same day notice of appeal was filed (JA 7). This Honorable Court has jurisdiction under the provisions of Section 1291 of Title 28 U.S. Code.

STATEMENT OF THE CASE

This is an appeal from a conviction for rape and housebreaking, and a subsequent denial of defendant's Motion for a New Trial.

This is the second trial, arising out of the same alleged rape and housebreaking occurrence. The first trial, which also resulted in conviction, was reversed by this Court,

Smith v. U.S., ___ U.S. App. D.C. ___, 312 F(2d) 867, and a new trial ordered.

During the second trial (as in the first trial), while defendant was on cross-examination, and after admitting intercourse with the prosecurtrix and testifying that she consented to intercourse, the Government, over defendant's objection (Tr 283-290) introduced an affidavit given under Federal Rule of Criminal Procedure 17(b) to impeach the defendant's testimony. This affidavit was given by defendant to secure subpoenas, for the first trial, in forma pauperis. Defendant, in his affidavit stated that he wished the witnesses to be subpoenaed to prove an alibi (viz. that he was somewhere else at the time of the alleged crimes).

During the second trial, for housebreaking and rape, defendant made several motions for mistrial, based upon repeated prejudicial references to "writing numbers", repeated by the U.S. Attorney after caution by the Trial Court to desist. These motions for mistrial were denied. (Tr. 251-262 passim)

At the close of the Government's case, defendant made a motion for judgment of acquittal (Tr. 187), which was renewed at the close of the case (JA 4) on the main grounds of lack of corroboration and lack of evidence to sustain a conviction.

STATEMENT OF POINTS

1. The use of the Rule 17(b) affidavit, given in the first trial to secure free subpoenas, to impeach defendant's creditibility in the second trial, violates defendant's right not to be a witness against himself; Rule 17(b) itself violates the same right, both in violation of the Fifth Amendment of the Constitution.

2. The Trial Court failed to grant defendant's motions for mistrial.

3. The Trial Court failed to grant defendant's motion for a judgment of acquittal.

SUMMARY OF ARGUMENT

Appellant's argument is summarized in the following categories:

1. The use of the Rule 17(b) affidavit and the Rule itself.
2. Several motions for mistrial.
3. Denial of the Motion for Judgment of Acquittal.

1. The Rule 17(b) Affidavit. At the preparation stage of the first trial, defendant, a pauper, gave an affidavit to secure free subpoenas under Rule 17(b) of the Federal Rules of Criminal Procedure which proved inconsistent with the defense which he ultimately pleaded at both the first and second trials. (See Appendix to this Brief.) The Government used the affidavit for impeachment in both trials (Tr 283-299) This violated defendant's right not to be a witness against himself, as does the Rule itself, and put him at a disadvantage as compared to a defendant with funds who may secure witnesses without revealing his purposes therefore. These same two issues were raised in the first appeal, and the panel which heard the first appeal rejected the arguments, Judge Wright dissenting.

2. Several Motions for Mistrial. The trial in

this case was for housebreaking and rape. On one occasion during the first trial, defendant "blurted" out in answer to a series of questions by the U.S. Attorney (JA First Trial 118) the following, on cross-examination:

> Q: Did they (meaning his lawyer and the Legal Aid Representative) ask you how you come to get $25 out of a $65 weekly salary?
>
> A: I told them I was making money, getting numb ers, I was writing numbers and everything, making money extra.
>
> Q: You were writing numbers and everything; what else besides the numbers were you doing to make money?
> A: Making money any kind of way, make money.

In the second trial, the U.S. Attorney brought up the matter again to the prejudice of the defendant:

(Tr 250-1)

> Q: Oh, you write numbers, don't you?
> A: No, sir, I don't...
>
> Q: You remember testifying at this trial previously?
> A: That's right...
>
> Q: ...didn't you say something about writing numbers?
> A: Yes.

(Tr. 250-262 passim) Defendant was interrogated on his having said that, in a privileged communication with his counsel and the Legal Aid representative that he had previously written "numbers". No showing was made that defendant was convicted of this crime. The only showing was that

he had said this to his attorney and Legal Aid assistant.

Defense attorneys asked for a mistrial, which was denied.

Appellant points out that the original conversation about the numbers (in the first trial) which was again opened up in the second trial to the prejudice of the defendant came about directly as a result of the use of the 17(b) affidavit (Tr. 256-7). Because the United States introduced the 17(b) affidavit, it became necessary in the first trial, (and again in the second trial) to open up the privileged discussions which counsel had with defendant to explain why the two differing affidavits had been given - this in turn permitted the unfair cross-examination of defendant about his conversation with counsel.

It should be emphasized that, at no time, did defendant ever admit that he wrote numbers - only that he admitted saying this to his counsel.

The mention of "numbers" as to which defendant had never been convicted was so prejudicial as to require a mistrial.

3. The Denial of Judgment for Acquittal. The only corroborative evidence of the complainaing witnesses' story was the testimony of her mother, repeating her daughter's

telephone version of the same thing (Tr. 165 et seq.) However, there were admitted in evidence (Tr. 194, 197) as Defendant's Exhibits Nos. 3, 4 and 5, previously identified as Government's Exhibits Nos. 1, 2 and 3 (attached to this Brief as an Appendix). This evidence indicated no signs of violence and that the patient was not accutely distressed. On the record, the judgment of acquittal should have been granted and there was not sufficient evidence for a conviction.

ARGUMENT

1. The affidavit of the defendant dated June 25, 1961, under Federal Rule of Criminal Procedure 17(b)was erroneously permitted to be used by the prosecution to impeach appellant's testimony.

In order that he might have witnesses subpoenaed without expense to the defendant, counsel executed an affidavit on or about June 25, 1961, in support of a motion for the issuance of subpoenas under Federal Rule of Criminal Procedure 17(b) (see Appendix to this Brief). The affidavit was on the standard printed form containing certain questions and in answer to two of these, the defendant stated as the reason that the witnesses were needed that they were expected "to establish that I was not at the scene of the crime at the time it was committed", and also that "evidence of the witness or witnesses is material to the defense

because it will establish my alibi."

At his second trial, the defendant testified in his own behalf and in his testimony admitted intercourse with the complaining witness at the place charged but testified that such intercourse was with the consent of the complaining witness (Tr. 219-220). On cross-examination the prosecution, over the objection of the defendant, used the affidavit to impeach him (Tr. 292-299). The document was identified at the trial as Government's Exhibit No. 4 (Tr. 291-292) and, while not offered in evidence, was read to the defendant in the presence of the jury (Tr. 297-298), which reading makes it obvious that it is the affidavit in the record in this case given on June 25, 1961. In making objection, the defendant specifically referred to the concurring and dissenting opinion of Judge Wright of this Court on the previous appeal (Tr. 284, 287-289) and specifically made the objection that the use of the affidavit "is a violation of this defendant's rights under the Fifth Amendment not to be compelled to testify against himself." (Tr. 288). The Court overruled the objection (Tr. 290).

Section 1915 of Title 28, U.S. Code provides that a citizen who makes affidavit that he is unable to pay costs or give security therefore may defend his suit without pre-

payment of fees and costs and that in a criminal case "witnesses shall attend as in other cases, and the same remedy shall be available as provided for by law in other cases." Federal Rule of Criminal Procedure 17(b), however, requires that indigent defendants not only file the affidavit generally required under Section 1915 to proceed in forma pauperis, but must go further by motion supported by affidavit in which he shall state not only the name and address of each witness but "the testimony which he is expected by the defendant to give if subpoenaed and shall show that the evidence of the witness is material to the defense," and "that the defendant cannot safely go to trial without the witness". As stated above, the affidavit used in this case to impeach the testimony of the defendant was filed under the requirements of this rule, having been executed on a printed form provided by the Clerk.

The purpose of Section 1915 of Title 28, especially where applied to criminal proceedings, is to place an indigent defendant in as nearly the same position as one who could afford the cost of his defense. To this end, in this Circuit, as throughout the Federal Courts, thousands of hours of the time of attorneys appointed without compensation to defend indigent prisoners, thousands of dollars of expense in printing

of records on appeal, to say nothing of the time of the Judges in both the Trial and Appellate Courts, are spent every year. Rule 17(b), however, flies in the face of this principle of equality by requiring an indigent defendant, in order to have witnesses subpoenaed to, in effect, give a written statement of his defense prior to trial.

The obvious purpose of Rule 17(b) is to prevent defendants from abusing the forma pauperis privilege by subpoenaing witnesses who have no connection with the case. Murdock v. United States, 283 F(2d) 585 (C.A. 10th, 1960); Reistroffer v. United States, 258 F(2d) 379 cert. den. 358 U.S. 927 rehearing den. 361 U.S. 856. If the rule can be sustained at all in the face of the Constitutional objections made, infra, it can only be sustained to the extent of allowing the affidavit to be considered by the District Court in passing on the motion for the subpoenas. If it is allowed to be used as it was below, it violates the defendant's rights under the Fifth Amendment to the Constitution of the United States which provides that "no person...shall be compelled in any criminal case to be a witness against himself".

Once the affidavit has been used by the District Judge who considers the motion for the issuance of subpoenas, it has served its purpose. To allow it to be used during

the trial to impeach the defendant does not further the purpose of the rule, yet deprives the defendant of his Constitutional right. The rule may only be sustained by prohibiting its use at the trial. The only alternative is to declare the rule invalid in toto.

In view of the provisions of Rule 17(b), it is obvious that,without the filing of an affidavit,the indigent defendant may not, like more affluent defendants, obtain the witnesses necessary for his defense. See Meeks v. United States 179 F(2d) 319 (C.A. 9th, 1950). He is therefore compelled to make the statement or, probably, lose his case. The Supreme Court had a somewhat similar question before it in Boyd v. United States, 116 U.S. 616 (1886) in which it declared invalid a provision contained in Section 5 of the Act of Congress of 1874 entitled "An Act to Amend the Customs Revenue Laws and to Repeal Moities" which required in defense of an action for forfeiture of goods seized upon allegations that they were imported in violation of customs laws of the United States that the claimant produces an invoice or else have the case decided against him. The Supreme Court held that this was a compulsion to testify against one's self, and, although the invoice was produced, admitted in evidence at the trial (over objection as in the instant case) held that the evidence

was not admissible and its admission was erroneous, and went further and declared said Section 5 to be unconstitutional. The analogy to the present case seems clear.

The Court also emphasized the importance of a broad and liberal construction of the Fifth Amendment, 116 U.S. at 635.

Relying upon the Boyd case, the United States Court of Appeals for the Fifth Circuit in an opinion by then District Judge Wright in a case involving violation of the Fourth and Fifth Amendments by stealth had this to say, Brock v. United States, 223 F(2d) 681 at 685 (C.A. 5th, 1955), "Evidence obtained at the end of a whip is no less voluntary than that derived by insidious and more subtle means where the opportunity to exercise the right against self-incrimination is absent. Before a man can be compelled to testify against himself, he must have a fair chance to exercise his right under the Fifth Amendment."

The Court of Claims recently held unconstitutional Section 2(A) of the Public Law 769, 68 Stat. 1142, 5 USCA § 840d because it deprived a person of an annuity or his retired pay if he relied upon the Fifth Amendment. Steinburg v. United States, 163 F. Supp. 590 (Ct. Cl. 1958).

It is true, of course, as pointed out by the majority opinion on the prior appeal, Smith v. United States, ___ U.S. App. D.C. ___, 312 F(2d) 867 (1962) that in the case of Tucker v. United States, 151 U.S. 164 (1894) a similar affidavit was used to impeach the defendant over objection and was held to be proper. However, in Tucker the constitutional objection was not made by the defendant. In the light of the development of constitutional law since 1894, it is submitted that the Supreme Court of the United States did not follow the Tucker case in the situation presented by this appeal.

Perhaps, appellant's position is best stated by the concurring and dissenting opinion of Judge Wright of this Court on the previous appeal, and particularly by the words with which he closed that opinion, ___ U.S. App. D.C. ____ at ____, 312 F(2d) 867 at ___:

> "Rule 17(b) humanely provides for the defense of indigents. Obviously, criminal rules which failed in this regard would not pass the constitutional test. But the indigent's Sixth Amendment right to 'compulsory process for obtaining witnesses' would mean little indeed if he were required to barter away his rights under the Fifth Amendment to exercise it. The rights of indigents, so lately won, may not so soon be eroded. Even if it were held that constitutionally a defendant may be compelled to file an affidavit to obtain Rule 17(b) rights, constitutionally that affidavit may not be used against him at his trial."

The judgment should be reversed with instructions on remand not to use the affidavit at the trial nor to use any portion of the testimony taken at either the first or second trial withrespect to the affidavit, or explaining why the defendant changed his theory of defense.

2. The Trial Court should have granted defendant's motions for a mistrial.

After the defendant had testified in his own behalf, and during cross-examination by the prosecution he was asked whether he wrote "numbers" (Tr. 250-251). Defendant's counsel objected to the question and the Court sustained the objection and struck the answer which had been given simultaneously with the question. (Tr. 251).

Nevertheless, counsel for the Government insisted on continuing the line of questioning and stated the following occurred (Tr. 251-252):

"BY MR. BLACKWELL:

Q: You remember testifying at this trial previously?
A: That's right.

Q: Well, didn't you testify about other sources of income?
A: That's right.

Q: All right, didn't you say something about writing numbers?
A: Yes.

"MR. MORGAN: Now, I move for a mistrial, Your Honor. You warned him not to bring that out and

> he brought it and I move for a mistrial again.
>
> "THE COURT: Well, I will deny the request for a mistrial and I do sustain the objection to that question as put. You may ask him--
>
> "MR. BLACKWELL: May I have the Court's indulgence a minute, if your Honor please?
>
> "THE COURT: Yes. It is just about time for the usual five minute recess.
>
> "Members of the jury, you may now have that recess."

After the recess, despite the two previous questions as to admissibility, counsel for the Government continued to pursue the point and the Court then permitted the previous testimony concerning the writing of the numbers to be read from the transcript of the first trial whereupon counsel again objected and moved for a mistrial (Tr. 253-254), and after a lengthy discussion at the bench the Court overruled the objection (Tr. 262).

The writing of numbers in and of itself could have no connection with the indictment and was in its crudest form merely to attempt to prejudice the jury as to the defendant by proof of a commission of a crime of which he had not been convicted. The situation was bad enough when the first motion for a mistrial was overruled with the instruction to the jury to disregard the testimony but when the Court

reversed itself after the recess and permitted the testimony to be considered by the jury and denied the renewal of a motion for mistrial, the prejudice to the defendant was compounded.

Doubtless, appellee will argue, as the Court suggested during discussions at the bench (Tr. 254) that the inadmissible evidence concerning the writing of numbers was not prejudicial in view of the previous convictions which had been admitted. However, it must have seemed prejudicial to the prosecution since he persisted in pursuing the point despite two adverse rulings by the Trial Court. The defendant should receive the benefit of the doubt here.

The judgment should be reversed and the Court remanded for a new trial with instructions not to permit the introduction of evidence concerning the writing of numbers.

3. The Trial Court should have granted judgment of acquittal at the close of the entire case.

At the close of the entire case the defendant moved for judgment of acquisition which was forthwith denied by the Trial Court (Tr. 285-286). The evidence in the case was similar to that adduced on the previous trial with respect to corroboration with one important difference. There was

admitted in evidence upon defendant's offer medical records (Defendant's Exhibits No. 3, 4, and 5, previously identified as Government Exhibits No. 1, 2 and 3, admitted Tr. 194, 197). Copies of these exhibits are appended to this Brief. These indicated no signs of violence and that the patient was not acutely distressed. Although the testimony of the complainant's mother relating to the telephone call was similar to that given at the first trial, that evidence now falls short of establishing corroboration of an essential element of the crime, lack of consent, in view of the documentary evidence now in the record concerning the physical examination that same morning.

CONCLUSION

For the reasons stated in Appellant's Brief, the judgment below should be reversed or remanded with instructions to grant judgment of acquittal depending on the grounds for reversal.

Respectfully submitted:

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Washington 5, D.C.

GILBERT HAHN, JR.
944 Washington Building
Washington 5, D.C.

Attorneys for Appellant

OF COUNSEL

MARK B. SANDGROUND
944 Washington Building
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WHITEFORD, HART, CARMODY & WILSON
815 Fifteenth Street, N.W.
Washington 5, D.C.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief and Additional Appendix for Appellant was mailed postage prepaid this day of October, 1963 to the office of the United States Attorney for the District of Columbia.

Gilbert Hahn, Jr.
Attorney for Appellant

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,959

BERNARD SMITH, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE.

Appeal From The United States District Court For The District of Columbia

---

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
JOEL D. BLACKWELL,
WILLIAM H. WILLCOX,
Assistant United States Attorneys.

QUESTIONS PRESENTED

In the opinion of the appellee, the following questions are presented:

1) Whether the propriety of the use for impeachment purposes of appellant's Rule 17(b) affidavit was settled by this Court's decision in appellant's prior appeal?

2) Whether evidence that appellant once said that he "wrote numbers" could have affected the jury's consideration of the instant rape case, in view of the nature of the case and the great amount and serious character of the other evidence impeaching appellant's credibility, including three felony convictions and evidence that he once swore that his defense was alibi when at trial it was consent?

3) Whether the testimony of four witnesses other than the complainant which established, *inter alia*, that the complainant made a prompt complaint and was hysterical and in tears after the offense, and that her bed and bedroom were disarranged, sufficiently corroborated the complainant's testimony that appellant broke into her house and raped her?

INDEX

TABLE OF CASES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,959

BERNARD SMITH, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE.

Appeal From The United States District Court
For The District of Columbia

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was indicted for housebreaking and rape. This Court reversed his first conviction. *Smith* v. *United States*, 114 U.S. App. D. C. 140, 312 F.2d 867 (1962). On re-trial a jury again convicted him on both counts. The District Court sentenced appellant to imprisonment for 10 months to 6 years, 3 months on each count, the sentences to run concurrently (J.A. 6).

The complaining witness, Mrs. Beulah Mae Taylor, is appellant's step-daughter. (Tr. 41). She is married. At the time of the crimes charged in the indictment she had three small children and was four months pregnant with

a fourth. (Tr. 40, 41). At about 5 a.m. on May 17, 1961, she was asleep in her bed in her home at 218 Anacostia Road, Southeast. (Tr. 42, 48, 49). Her children were in another room. No one else was in the house except Mrs. Taylor and her children. Her husband, who is a serviceman, was overseas. (Tr. 46). Mrs. Taylor testified: "I was in my bed asleep, and I heard this noise in the hall, and I called out and asked who was it; and didn't nobody answer. So I called again; still nobody answered. Then I got scared, because I thought it might have been one of my kids going to the bathroom, but I figured they would have answered . . . So I got up and turned the light on, and I saw my stepfather standing in the hall . . . When I saw him standing in the hall, I called to him. I called, Daddy . . . When I called and said, Daddy, he jumped on me. I screamed; he knocked me across the bed. We tussled; he started choking me; he knocked me on the floor the other side of the bed and he kept right on choking me. I kept calling him, Daddy, Daddy; and he kept right on choking. He looked like he was sort of drunk, and I didn't think he knew what he was doing or where he was. He just kept choking me; and I kept calling him. Evidently I must have blanked out because I remember I was on the floor and when I came to, I was on the bed and he was on top of me and he was inserting himself into me . . . When I was on the floor, he was on top of me, choking me, and I kept calling him and pushing at him, calling, saying, Daddy, Daddy, and he kept right on choking me. After that I don't remember anything until I was laying on the bed. I don't remember him putting me on the bed . . . I asked him how did he get in and why was he doing this to me. And he looked over on the floor and saw water on the floor. He thought it was blood; and he said that I made you lose your baby. I said; No, it is just water. I guess I had wet on myself. I kept asking him, you know, why did he hurt me. And he said he didn't know what he was doing; he was sorry; forgive him; don't tell my mother or turn him in, because he could only get in trouble. I

heard the people up next door, so I knew they had heard me scream. I was nervous and scared, because I thought he would start choking me again, so I told him I wouldn't tell, to try to keep him quiet and get him out of the house. I asked him how did he get in. He said he got in through the window, through the kitchen window . . . He went on downstairs; kept on telling—begging me not to tell, he was sorry and didn't know what he was doing. I told him people on the end house supposed to come over . . . lady wanted me to baby sit for them. He said he would leave." (Tr. 42-45).

As soon as appellant left Mrs. Taylor called her mother and told her what had happened. (Tr. 47-48). She then called the police. (Tr. 48). Later she confronted and accused the defendant at the office of the sex squad. In reply "(h)e said he wasn't sure whether he was there or not, he didn't know. Say that he could have been there or he couldn't have been there, he didn't know; he wasn't sure." (Tr. 49-50). Mrs. Taylor also testified that she had never had sexual relations with appellant. (Tr. 50).

Mrs. Maggie Lee Smith, who is appellant's estranged wife and Mrs. Taylor's mother, testified that she received a telephone call from Mrs. Taylor between 5 and 5:30 a.m. on May 17, 1961. (Tr. 138-139). "She called me, said: Mother, Daddy been over here; broke in on me and raped me . . . She was crying . . . She told me to call the police . . . I told her to call the police, because it looked more for her to call the police than me because I wasn't there." (Tr. 140). Shortly thereafter, Mrs. Smith arrived at her daughter's house. She found Mrs. Taylor "very nervous, upset, crying." (Tr. 141, 142).

Mrs. Gertrude Smith, Mrs. Taylor's next door neighbor, testified that between 5 and 5:30 a.m. on the morning of May 17, 1961, she "heard a loud scream coming from Mrs. Taylor's . . . bedroom . . . It was a loud frightened scream." (Tr. 165-166). She recognized Mrs. Taylor's voice. (Tr. 168).

Officer Eger of the Metropolitan Police testified that he received a call to go to Mrs. Taylor's house at 5:20 a.m.

on May 17. He responded "just moments later." Mrs. Taylor was "very hysterical, crying, upset." In the bedroom "the bed sheets were all disarranged, pillows disarranged, and on the right side of the bed on the floor there was water, what appeared to be water, over the floor." (Tr. 111-113).

Officer Bonaccorsy of the sex squad also went to Mrs. Taylor's house on the morning of the crime. (Tr. 171). "Mrs. Taylor was emotionally upset, quite excited." (Tr. 172). "I noticed that the bed had been messed, the sheets were ruffled, the linens were ruffled and I also observed a pool of liquid on the floor along side the bed that Mrs. Taylor had told me would be there and then we went downstairs and I went to the kitchen and observed where the apparent entry had been gained through the kitchen window." (Tr. 171-172). The water beside the bed appeared to be urine. (Tr. 174). The officer was present at the sex squad office about 10:50 the same morning when Mrs. Taylor, in appellant's presence, told the same story she told on the witness stand. (Tr. 174-176). "He denied any knowledge of this accusation. He told her in our presence that he doesn't know anything about it, that he wasn't ever there at the time in question, and that . . . he was drunk and he didn't remember anything about that." (Tr. 176).

Appellant took the stand. He testified that he was living with one Lottie Jones at the time of the occurrence charged in the indictment. (Tr. 199, 209-212). He admitted having intercourse with Mrs. Taylor on that occasion, but said that it was with her consent. (Tr. 220). He testified that he had paid Mrs. Taylor $25 for intercourse on three prior occasions. (Tr. 204, 230). On another occasion she had intercourse with him when he brought her some food. (Tr. 209-210). On the occasion in question at trial, after they had intercourse Mrs. Taylor fought with him because she discovered he gave her only $17 instead of $25. (Tr. 211-223). When asked by his counsel if he saw something wet on the floor he

replied, "Yes, sir . . . that was she throwed up on the floor." (Tr. 223).

On cross-examination appellant admitted two convictions for robbery, and one for burglary. (Tr. 228, 263). He acknowledged that when, prior to his first trial, he filled out a Rule 17(b) affidavit requesting that witnesses be subpoenaed he swore that he needed the witnesses to establish an alibi. (297-298).

As stated, the jury convicted appellant on both counts in the indictment.

STATUTES INVOLVED

Title 18, District of Columbia Code § 2801 provides in part:

> Whoever has carnal knowledge of a female forcibly and against her will, or carnally knows and abuses a female child under sixteen years of age, shall be imprisoned for not more than thirty years.

Title 18, District of Columbia Code § 1801 provides:

> Whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building, or any apartment or room, whether at the time occupied or not, or any steamboat, canal boat, vessel, or other watercraft, or railroad car, or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be imprisoned for not more than fifteen years.

SUMMARY OF ARGUMENT

I

The propriety of the use for impeachment purposes of the Rule 17(b) affidavit, which affidavit contradicted

appellant's testimony on the stand, was settled by this Court's decision in appellant's first appeal, *Smith* v. *United States*, 114 U.S. App. D.C. 140, 312 F.2d 867 (1962).

II

Evidence that appellant once said that he "wrote numbers" could not have affected the jury's consideration of the instant rape case, in view of the nature of the case and the great amount and serious character of the other evidence impeaching appellant's credibility, including three felony convictions and evidence that he once swore that his defense was alibi when at trial it was consent. Appellant's counsel conceded as much in his argument to the jury.

III

The testimony of four witnesses other than the complainant, which established, *inter alia*, that the complainant made a prompt complaint and was hysterical and in tears after the offense and that her bed and bedroom were disarranged, amply corroborated the complainant's testimony that appellant forced his way into her house and raped her in her bedroom. Positive medical testimony has never been a requisite of adequate corroboration. And in this case the complainant was the mother of three children and the defendant admitted intercourse.

ARGUMENT

I. The propriety of the use of the Rule 17(b) affidavit was settled by this Court's decision in appellant's prior appeal.

Appellant protests the use for impeachment purposes of the affidavit he filed pursuant to Rule 17(b), in which he stated that he needed the requested witnesses to establish an alibi. This Court settled this issue when it dealt with it in appellant's appeal from his first con-

viction. In reversing appellant's conviction the Court stated: "Since a new trial must be had it is incumbent upon us to treat two other points raised by appellant because they may arise on retrial." *Smith* v. *United States*, 114 U.S. App. D. C. 140, 142, 312 F.2d 867, 869 (1962). The Court then discussed the Rule 17(b) issue and ruled that the use of the affidavit for impeachment purposes was proper.

II. Evidence that appellant previously said that he wrote numbers could not have prejudiced the jury.

Appellant complains (Br. 5-6, 14-16) that the jury learned that he spoke about "writing numbers" at his previous trial, and says that because it did he is entitled to a new trial. In view of the nature of the case and the amount and character of the other evidence impeaching appellant's credibility, evidence of this peccadillo could not have affected the jury's consideration of the case. Appellant admitted that he had been convicted twice for robbery and once for burglary. It was his testimony that while married to one woman he was living with another and engaging in acts of intercourse with a third, his step-daughter, who was the mother of three children and whose husband was a serviceman overseas. He admitted that he lied when he swore in the Rule 17(b) affidavit that he could establish an alibi. It is inconceivable that to the extent that the impeaching of appellant's credibility and character had an effect on the outcome, evidence that appellant once said he wrote numbers could have had any significant effect, or indeed any effect at all, on the jury's assessment of his character and credibility, which was totally impeached by other evidence. As the trial judge said: "When someone has been convicted of all the things he has been convicted of, it seems to me answering a question of numbers, is of no significance at all." (Tr. 254).

In argument to the jury appellant's counsel himself wrote off appellant's character, and he did so without

reference to the writing of numbers. His argument was that, accepting appellant's bad character and dubious credibility, his highly implausible story was nevertheless plausible, and Mrs. Taylor's highly plausible story was in fact implausible. (Tr. 425-446). He said:

> "If you have to deal with a man who has been convicted of prior felonies and you feel that prejudices you against him in a rape case, then you mustn't listen to the rest of my argument.
>
> If you have to deal, as you do in this case, with a man who has led a dissolute life, whose appearance may not be the most comely, a man who has had to tell you that he was driven to change his original story that he told his attorneys and tell a different story, a man who has lived with a common law wife when he was married to someone else, even a man who would consider having an illicit affair with someone as close to him as his stepdaughter, let alone pay her money—if any of those facts that I have just recited to you closes your mind to what I have to say after that, then you have got to do so, and you can't go the rest of the journey with me.
>
> But I don't think you are going to do any of those things because you have taken an oath that you will let none of these things affect your judgment of this case. . . .
>
> No matter how good or how bad a man, in the normal case of a rape charge, and that is true in this one, and the difficulty in trying it, there are normally only two people together where the rape is alleged to have taken place. And where we do not have the same story from those two people, we have to try to rely on something else. (Tr. 426-427).

In short, the record does not support reversal on the tenuous ground urged by appellant. Rule 52(a), Fed. R. Cr. P.; Title 28 U.S. Code § 2111; *Campbell* v. *United States*, 85 U.S. App. D. C. 133, 175 F.2d 45 (1949).[1]

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[1] In *Campbell*, a rape case in which the defendant took the stand, the trial judge erroneously admitted over objection a petty

III. There was ample corroboration of Mrs. Taylor's testimony that appellant raped her.

Mrs. Taylor's frightened scream, her prompt complaint to her mother and the police, her hysterical state after the offense occurred, the disarranged bedclothes, the liquid on the floor beside the bed, and the open kitchen window, all of which were testified to by persons other than herself, furnish ample corroboration of Mrs. Taylor's testimony that appellant raped her. *Ewing* v. *United States*, 77 U.S. App. D. C. 14, 16-17, 135 F.2d 633, 635-636 (1942); *McGuinn* v. *United States*, 89 U.S. App. D. C. 197, 191 F.2d 477 (1951); *Walker* v. *United States*, 96 U.S. App. D. C. 148, 223 F.2d 613 (1955); *Hughes* v. *United States*, 113 U.S. App. D. C. 127, 129, 306 F.2d 287, 289 (1962). The cases show that positive medical testimony has never been a requisite of adequate corroboration. And in the present case it is to be remembered that Mrs. Taylor was the mother of three children at the time of the crime, and that appellant admitted that intercourse occurred.

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larceny conviction of the defendant which was pending appeal. This Court affirmed the conviction in the rape case, stating: "Concerned as it was with considering evidence of revolting criminal acts, it is not conceivable that the jury gave more than the slightest weight to the appellant's admission of having been convicted of stealing a bottle of perfume." 85 U.S. App. D. C. at 136. And in *Campbell* it does not appear that the defendant's credibility was otherwise impeached, as it was here, by other convictions or by any other evidence.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

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